82-894

CASE NO. _____

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IN THE

Supreme Court of the United States

October Term, 1982

DENNIS MASTRO and PETER DeLAMOS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Were Defendant's Sixth Amendment rights violated by rulings under Rule 801, Federal Rules of Evidence, whereby Defendants were not confronted by witnesses against them, but by tape recordings involving two men who were dead at the time of the indictment (but were nevertheless named as "unindicted-co-conspirators"), and one 90-year old man named as a Defendant and co-conspirator (but who did not appear at the trial under a severance order based on his age and physical infirmities)?

2. Were Defendants' Fifth Amendment rights to a fair trial and due process of law violated by rulings under Rule 801, Federal Rules of Evidence, resulting in convictions on the basis of tape recordings of coerced and involuntary statements made by Defendants who were actually the victims of an extortion conspiracy but who, because of fear of severe or fatal injury to themselves or members of their families, pretended to complicity in a plan of their victimizers to share unlawfully in the profits of a Las Vegas restaurant-casino?

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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DENNIS MASTRO and PETER DeLAMOS petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

PARTIES TO PROCEEDING

This proceeding originated in a criminal prosecution in the United States District Court for the District of New Jersey, wherein the United States of America was the plaintiff and DENNIS MASTRO, PETER DeLAMOS and PAUL BENDETTI were defendants.

All three defendants appealed from their convictions to the United States Court of Appeals for the Third Circuit.

PAUL BENDETTI is preparing a separate petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OFFICIAL AND UNOFFICIAL REPORTS

The disposition of the appeal in the United States Court of Appeals for the Third Circuit was not by any written, published opinion, but by a Judgment Order dated September 29, 1982, and entered September 29, 1982.

A motion for rehearing and suggestion for rehearing en banc was timely filed by Petitioners and was denied by Order Denying Rehearing and Rehearing en banc, dated and entered on October 22, 1982.

Copies of the aforesaid Judgment Order and Order Denying Rehearing and Rehearing en banc are reproduced as Appendices "A" and "B" herein.

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of New Jersey was founded on a federal grand jury indictment charging Petitioners with the violation of federal statutes: Title 18, United States Code, § 1962(c) and (d) and § 2314.

The jurisdiction of the United States Court of Appeals for the Third Circuit was founded on the Petitioners' timely appeal from their criminal conviction pursuant to Title 28, United States Code, § 1291.

Jurisdiction of this Honorable Court is invoked under Title 28, United States Code, § 1254(1).

The Judgment Order of the United States Court of Appeals for the Third Circuit is dated September 29, 1982, and was entered September 29, 1982.*

A timely petition for rehearing and suggestion for rehearing en banc was filed by Petitioners on October 6, 1982, and denied by Order Denying Rehearing and Rehearing en banc, dated and entered on October 22, 1982.**

*See Appendix "A".

**See Appendix "B".

STAY OF MANDATE

The United States Court of Appeals for the Third Circuit entered on order on November 1, 1982, staying issuance of the mandate to November 28, 1982, provided that upon notification of the filing of a petition for a writ of certiorari, the stay shall continue until final disposition by the United States Supreme Court. The order is reproduced in Appendix "C" hereof.

PROVISIONS OF CONSTITUTION AND FEDERAL RULES OF EVIDENCE

Amendment V of the United States Constitution provides, as pertinent:

> "No person shall be . . . deprived of life, liberty or property, without due process of law . . ."

Amendment VI of the United States Constitution provides, as pertinent:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . ."

Rule 801, Federal Rules of Evidence, provides:

"Rule 801. Definitions

"The following definitions apply under this article:

"(a) *Statement.* A 'statement' is (1) an oral or written assertion of (2) nonverbal conduct of a person, if it is intended by him as an assertion.

"(b) *Declarant.* A 'declarant' is a person who makes a statement.

"(c) *Hearsay.* 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

"(d) *Statements which are not hearsay.* A statement is not hearsay if —

(1) *Prior statement by witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

"(2) *Admission by party-opponent.* The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

STATEMENT OF THE CASE

Anthony "Little Pussy" Russo was a long-time suspect of involvement in organized crime. Wiretaps were installed on the phone in Russo's New Jersy Office. A bug was placed in a Las Vegas apartment sometimes used by Russo to intercept room conversations and Russo's side of phone calls. A bug was also used at a restaurant site for a meeting between Anthony Russo, his brother, John Russo, and Ruggerio "The Boot" Boiardo, the asserted overlord of the Russos.

Defendant DeLamos, Defendant Mastro and Co-Defendant Bendetti had each been engaged, independently, in operating restaurant businesses in New Jersey. DeLamos and Bendetti became the licensed owners of a small restaurant-casino in Las Vegas. Defendant DeLamos remained in New Jersey. The Las Vegas enterprise was run by Co-Defendant Bendetti. Defendant Mastro (who had not succeeded in getting a gaming license) was employed as Food and Beverage Director of the Las Vegas restaurant-casino.

The wiretaps and bugs focused on Anthony Russo also netted conversations (a) between Anthony Russo and Defendants about Russo's claim of ownership and entitlement to a portion of the proceeds of the restaurant-casino; (b) discussions between the two Russos about the money Anthony Russo had received or expected to receive from Defendants; and (c) a restaurant conversation between the two Russos and Boiardo about the division of the money received by Anthony Russo.

The murdered body of Anthony Russo was discovered at a spa in Long Branch, New Jersey, on April 26, 1979. Not long after that, John Russo died.

Several months after the murder of Anthony Russo and the death of John Russo, a New Jersey federal grand jury indicted Defendants, Co-Defendant Bendetti, and Co-Defendant Ruggerio Boiardo for RICO conspiracy and substantive offenses and numerous charges of interstate travel and phone calls relating to alleged conduct of the restaurant-casino business through a pattern of racketeering activity. Both deceased Russos were named as un-indicted co-conspirators. The trial of Boiardo was severed because he was 90 years old and physically unable to stand trial; there is no likelihood that Boiardo will ever be brought to trial. Boiardo made no appearance at Defendants' trial.

In preparing for trial, Defendants were confronted, not with

witnesses, but with "dead-man" tape recordings. Defendants protested that they never voluntarily entered into a conspiracy but were, in fact, the victims of a Russo-Boiardo conspiracy to extort money under initial and continuing threats from Anthony Russo that unless Defendants complied with Russo's money demands, Defendants and their families would receive grave or deadly harm from Russo and his associates. Defendants, who were mortally afraid of Anthony Russo and his power, used their own money to pay Russo and in communications with him feigned agreement with Russo's aims.

Internally, the tape recordings display Anthony Russo aggressively dominating all conversations, continually menacing the Defendants, and making unending, threatening demands for money. Defendants are heard to acquiesce in the demands, generally assert that the restaurant-casino business was small and unprofitable, and discuss sums of money which had been or would be paid to Russo. The Russo-Russo and the Russo-Boiardo tapes show Anthony Russo claiming complete control over Defendants.[1]

On one tape, Anthony Russo was talking to one, Angelo Sica and asked Sica to get some people to go to one of DeLamos' New Jersey restaurants and threaten to "unionize" all of the DeLamos' restaurants and prevent chefs and bartenders from coming to work. Russo explained to Sica:

> "These guys [Defendants] belong to me but there's a motive why I want to do this: Because they're making a move, and if they make a move without saying anything, then I'm going to f... them good. Then we'll make a score."

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[1]In one conversation John Russo questioned Anthony Russo's power over Co-Defendant Bendetti. Anthony Russo responded: "I do anything I want with him." "He doesn't tell me what to do." "I do anything I want. I throw him against the f..... wall. I chase him out tomorrow morning. Beat it."

Russo also wanted a threat thrown down against restaurants owned by Defendant Mastro. A few minutes later, Russo called Mastro and described the "union trouble" which would happen at DeLamos' restaurants and told Mastro to arrange a meeting with DeLamos in which Anthony Russo would sit down with the "union people". Shortly after that, persons posing as labor union goons did actually visit a DeLamos restaurant and threaten that if the Defendants did not immediately contact Anthony Russo, the chefs and bartenders would not come to work and the restaurant would be shut down the next day.

Angelo Sica was convicted in New Jersey of aiding and abetting Anthony Russo in attempting to obtain money from DeLamos by false pretenses.[2]

Evidentiary use of the tape recordings was opposed by Defendants throughout the case on grounds the Defendants were being deprived of their Sixth Amendment right of confrontation; the lack of voluntariness in the statements of the Defendants on the tapes; the need for a pretrial hearing on the existence of independent evidence to establish the existence of a conspiracy; that the conversations on the tapes were not in furtherance of any alleged conspiracy; and that Defendants, instead of being members of a criminal conspiracy were the victims of a criminal conspiracy of the Russos and Boiardo.

The Trial Court refused a pretrial hearing on the existence of evidence, independent of the tapes, to establish a conspiracy. The Trial Court also refused a pretrial hearing on the voluntariness of the Defendants' tape-recorded statements. The Trial Court ruled that each tape recording in which a Defendant was a conversant was admissible against that Defendant as a "verbal

[2]Defendants were compelled by the trial judge to choose between offering the testimony of Sica about the plot against Defendants, or offering proof of the conviction of Sica, so the Sica conviction was never allowed to be revealed to the jury.

act" under Rule 801(d) (2) (A), Federal Rules of Evidence; and that the statement of others on the tape-recordings were admissible under Rule 801(d)(2)(E), Federal Rules of Evidence, as statements of co-conspirators during the course and in furtherance of the conspiracy.

For several days, the jury listened to tape recordings. Individual transcripts of the tape recordings were given to each juror for use in deliberations, over Defendants' objections.

The jury found the Defendants guilty. Identical sentences were imposed on them involving, for each, total fines of $60,000, a three-year term of imprisonment and a successive five-year term of probation.

The tape-recording issues were raised on Defendants' appeal to the United States Court of Appeals for the Third Circuit.[3]

The appeal was disposed of by a "Judgment Order" which merely enumerated the issues raised by Defendants and, in a single clause, adjudged and ordered affirmance of the judgment of the District Court.

ARGUMENT FOR WRIT

The Confrontation Clause had its origin in early abuses and dangers attending the use, or possible use, of trials by depositions or ex parte affidavits without giving an accused the right to personally examine and cross-examine the witness against him.

[3]Numerous other issues were raised on the appeal relating to the conduct and rulings of the trial judge. However, in evident deference to the trial judge, defense counsel allowed matters to go without objection, or after bench colloquy, backed down from their objections. While these other issues, briefed on the appeal under the doctrine of plain error, contributed to the lack of a fair trial, the issue raised in this Petition is the only issue, standing alone, which appears to be of sufficient gravity and national importance to prompt this Honorable Court to review the case upon a Writ of Certiorari.

Such right was necessary to test the recollection and sift the conscience of the witness, and to compel the witness to stand face-to-face with the jury. The jury could then look at the witness, observe his demeanor on the stand, the manner in which he testified, and determine whether his testimony was worthy of belief. *Mattox v United States*, 156 US 237, 15 SCt 337, 39 LEd 409 (1895).

At an earlier time (before adoption of the Federal Code of Evidence), law schools taught that hearsay evidence consisted of a statement, not made under oath and not subject to cross-examination. Exceptions to the rule excluding hearsay testimony as developed by the common law were, each and all, founded upon the existence of facts which justified placing a high degree of credibility upon the statement. Thus, in the ordinary course of human conduct, persons were not likely to lie in statements made in the short time allowed them in the face of known, impending death. Certificates of marital or baptismal events kept by disinterested clergymen or public officials authorized to perform such ceremonies could be depended upon as reflecting truth. Res gestae declarations made about a startling event while the declarant was still under the immediate stress of excitement from that event could be accepted as true.

The plurality opinion in *Dutton v. Evans*, 400 US 74, 86, 27 LEd2d 213, 91 SCt 210 (1970) recognized that the Confrontation Clause and the evidentiary hearsay rule stem from the same roots. That opinion declined to equate the two, but recognized the necessity of testing each case where hearsay was used with an analysis of the defendant's right to confrontation and cross-examination. *Dutton* was not a prosecution for conspiracy, but for murder, and a witness was permitted to testify to the statement made to him by an accomplice in the crime implicating the defendant in the commission of the crime. The statement had been made to the witness, who was present in court to be examined about all the circumstances under which the statement was made and any other pertinent matter. In the context of

the trial, the statement was not devastating or crucial to obtaining a conviction of the defendant. In addition, numerous other facts gave to the hearsay statement substantial "indicia of reliability."

Rule 801, Federal Rules of Evidence, bears no internal evidence that it was drafted with reference to tape-recordings as evidence. Similarly, the Notes of the Advisory Committee on Proposed Rules with reference to Rule 801 are silent with respect to any use of tape-recordings.

The result is that widespread evidentiary use of tape-recordings exists without any guidelines to keep that use within the confines of compliance with the Confrontation Clause. The danger of the use of tape-recordings comes to its ultimate exaggeration in the instant case, where massive use was made of tape-recording evidence (virtually the entire case against Defendants), and three of the conversants on tapes were not present in court because they were either dead or their presence could not be compelled. Additionally, the absent declarants conspired to and did victimize the Defendants. Not only were defendants deprived of their rights of confrontation and cross-examination, the tape-recordings themselves were not supported by any "indicia of reliability" whereby the content of the conversations could be taken for truth.

The Court, over the years, has dealt with confrontation and cross-examination issues arising on a limited scale, and under circumstances affording assurance that the Confrontation Clause had not been substantively infringed.[4]

[4] *Mattox v United States*, supra, involved the use of the use of testimony of two witnesses at a prior trial who died before the re-trial of the case. At the first trial both witnesses had been present in court and fully examined and cross-examined.

California v. Green, 399 US 149, 90 SCt 1930, 26 LEd 489 (1970) approved the use of preliminary-hearing testimony to refresh the memory of a trial witness, where the witness had been cross-examined at the preliminary hearing and was a witness at the trial and once again subject to full and effective cross-examination.

Where there has been an incursion on the Confrontation clause, the Court has been quick to recognize and forbid it.[5]

There are no reported cases which have upheld an entire trial by tape-recording, which is surely as rife with possibilities for danger and oppression as a trial by ex parte affidavit. Nor are there any cases affirming convictions where all the incriminating evidence came from persons never under oath and never subject to cross examination at any time.

The limited and restrained use of out-of-court declarations which have been upheld have no comparison with the massive use of tape-recordings in the instant case.

Those cases which have reversed convictions because of a violation of the Confrontation Clause involved far less of an abuse of constitutional rights than the instant case. If the present evidentiary use of tape-recordings is permitted to stand under Rule 801, then it can truly be said that justice has strained at a gnat and swallowed a fly.

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[5]*Pointer v Texas*, 380 US 400, 13 LEd2d 923, 85 SCt 1065 (1965) found a violation of defendant's constitutional rights in the evidentiary use of a preliminary-hearing transcript of testimony at which time the accused had no lawyer and did not try to cross-examine the witness.

Douglas v Alabama, 380 US 415, 13 LEd2d 934, 85 SCt 1074 (1965) found a violation of the Confrontation Clause where the prosecutor, under the guise of "refreshing the recollection" of the witness-accomplice was permitted to read before the jury the confession of the accomplice inculpating the defendant after the accomplice-witness refused to state whether or not he made the statements in the confession.

Brookhart v Janis, 384 US 1, 16 LEd2d 314, 86 SCt 1245 (1966) involved a denial of any right of cross-examination as to any witness plus the reception of an out-of-court confession allegedly made by a co-defendant who did not testify in court.

Barber v Page, 390 US 719, 20 LEd2d 255, 88 SCt 1318 (1968) condemned the use of a preliminary-hearing transcript where the prosecution had not made a "good faith" effort to obtain the presence of the witness at the trial.

There are many forms of evidence: testimony, physical exhibits, and documents. All of these kinds of evidence are strictly limited in their reception to relevance, and to the laying of foundations to establish the authenticity and reliability of exhibits and documents. The legislation on the use of electronic surveillance [18 USC §§ 2510-2520__] reflects only Fourth Amendment considerations with respect to the procedures which must be followed to obtain authority to conduct electronic surveillance. That legislation is silent on the matter of evidentiary use of tape-recordings except to require suppression of evidence unlawfully obtained.

A tape-recording cannot be put under oath or cross-examined, as can a witness giving testimony. A physical exhibit for which a proper foundation has been laid is what it is, and its importance, who possessed it, how it was used, or how it was capable of being used, are matters which are the subject of testimony of witnesses under oath and available for confrontation and cross-examination. The same is true of documentary exhibits. Witnesses can testify and be cross-examined about the documents, their execution, and, often, about the meaning of words contained therein.

Tape-recordings are merely another form of evidence, but no restraints govern the use of tape-recordings. They are offered by the Government as truth. They are received by the jury as truth. Yet private conversations which have not been tape-recorded are rarely admissible as hearsay, and when they are found admissible, it is only as in *Dutton v Evans*, supra, under the most stringent requirements.

The science of semantics has only recently begun to concern itself with the range of factors which influence verbal intercommunication. One court recognized that a tape-recording of a conversation between an informant and a suspect, wherein the informant led the conversation and attempted to obtain ad-

missions by the suspect to lengthy, incriminating "leads" of the informant, had a potentiality for prejudice which outweighed its probative value. *United States v Barletta*, 652 F2d 218, 220 (1st Cir. 1981). Additionally, *Barletta* noted that the matter which the Government relied on was ambiguous — the matter consisted of a rather elaborate inquiry or statement by the informer containing several assertions obliquely suggesting the defendant's criminal involvement, followed by some pause, or denial, or response by way of a comment on a different subject.

Often when a person is speaking with another, a statement is not disputed out of politeness, or some words such as "yes" or "uh-hum" may be used as a response merely to indicate that the listener has heard the statement made, without intending any admission of the truth of the statement. In the present case, the Defendants responded with acquiescence to the statements of Anthony Russo because they were terrified of him, and not because they were making a "statement" intended as an assertion of truth or an admission.

Notably, the use of electronic surveillance evidence is rare in civil litigation, where the parties do *not* have the Confrontation Clause to protect them. Indeed, except in the case where a private party records a conversation in which he is a participant, electronic surveillance is outlawed to the citizenry. This surely is eloquent of a national policy against the routine evidentiary use of tape recordings. In a number of states recording of private conversations is not permitted without the consent of both parties to the conversation.

In the field of criminal law, where the Confrontation Clause *does* protect the accused, the use of tape-recorded evidence is increasing heavily. In 1981 there were, nationally, 589 authorizations for electronic surveillance, 208 extensions of such orders, and 13,355 days in which electronic surveillance was in operation. The most massive use of electronic surveillance was by federal investigators who utilized 106 intercept authorities

and 66 extension orders for operations over a period of 4,000 days.[6]

The popularity of this investigative device stems from the ease of use, relieving investigators of the more onerous burden of leaving their offices, conducting physical surveillance, interviewing witnesses and chasing leads. The popularity also stems from the likelihood that juries believe that what is said in a tape recording is true, so convictions are easier and more certainly to be obtained.

The foregoing considerations all necessitate the granting of a writ of certiorari to examine the instant cases with respect to the Defendants' constitutional rights of confrontation and cross-examination.

Additionally, the trial court's application of Rule 801, Federal Rules of Evidence, violated Defendants' rights under the Due Process Clause to have a judicial determination of the voluntariness of their statements on the tape recordings before the evidence went to the jury. Defendants were also entitled to a judicial determination on the basis of evidence independent of the tape-recordings, as to whether the Defendants were the members — or the victims — of a criminal conspiracy.

Respectfully submitted:

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[6]Statistics quoted from "Report on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications," Administrative Office of the United States Courts, Washington, D.C., 1982, p.6.